

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 22295-1-III

Respondent,

Division Three

v.

GORDON BRET CONRAD,

UNPUBLISHED OPINION

Appellant.

SWEENEY, C.J.—When sentencing a sexual offender to an indeterminate sentence under RCW 9.94A.712, the court does not violate the Sixth Amendment as set forth in *Blakely*¹ by imposing an exceptional minimum based on its own findings, so long as the minimum sentence imposed does not exceed the statutory maximum. *State v. Clarke*, 156 Wn.2d 880, 886-87, 134 P.3d 188 (2006).

The sentencing court grouped Gordon Brett Conrad's numerous sexual offenses into four sentencing units based on the degree of seriousness and standard range. Pursuant to RCW 9.94A.712, the court imposed a maximum sentence of life in prison.

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

The court then imposed the high end of the standard range as the minimum for each offense. Standard sentencing called for all sentences to be served concurrently, but the court found the resulting sentence clearly too lenient. The judge therefore ordered two sentences from the most serious group to be served consecutively. This resulted in a minimum term actually served of 636 months instead of 318 months.

Mr. Conrad appealed. In an unpublished opinion filed June 9, 2005, we agreed with Mr. Conrad that his sentence violated *Blakely*, by subjecting him to a penalty based on aggravating factors not found by a jury. *State v. Conrad*, noted at 128 Wn. App. 1001 (2005). Divisions One and Two of this court split on the question. *See State v. Clarke*, 124 Wn. App. 893, 902, 103 P.3d 262 (2004), *aff'd*, 156 Wn.2d 880; *State v. Borboa*, 124 Wn. App. 779, 102 P.3d 183 (2004), *overruled in part by Clarke*, 156 Wn.2d 880.

The Supreme Court accepted review of *Clarke* and determined that an exceptional minimum pursuant to RCW 9.94A.712 can be based on the judge's own findings of aggravating factors. *Clarke*, 156 Wn.2d at 886-87. Accordingly, we withdrew our earlier opinion.

Clarke unequivocally holds that the Sixth Amendment right to a jury determination of factors that increase the penalty for a criminal offense is not violated by the indeterminate sentencing scheme of RCW 9.94A.712. *Clarke*, 156 Wn.2d at 888. The court may impose an exceptional minimum based on its own findings that aggravating factors render a standard range minimum

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too lenient. The only proviso is that the exceptional minimum cannot exceed the statutory maximum. In the case of RCW 9.94A.712, the statutory maximum is life.

The court declined to consider whether an analysis under Washington's constitution instead of federal law would produce a different result, because that issue was briefed solely by amicus. *Clarke*, 156 Wn.2d at 894.

Clarke is dispositive for Mr. Conrad. We affirm his sentence.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, C.J.

WE CONCUR:

Schultheis, J.

Kato, J.